# STATE OF MICHIGAN

# COURT OF APPEALS

RAYNELL MCCONNAL,

Plaintiff-Appellant,

v

WEST SIDE CONCRETE COMPANY,

Defendant-Appellee.

UNPUBLISHED
June 20, 2006

No. 267390
Wayne Circuit Court
LC No. 05-516437-NO

Before: Davis, P.J., and Sawyer and Schuette, JJ.

PER CURIAM.

In this slip and fall case, plaintiff appeals as of right from the circuit court's order granting summary disposition to defendant. We affirm. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

Plaintiff alleges that, early one morning in 2002, she was walking on a public sidewalk when she inadvertently stepped off the pavement and into a hole in the ground that was three or four inches deep, causing her to suffer a torn right rotator cuff. The stretch of sidewalk in question had just been reconstructed by defendant, acting as a subcontractor. Plaintiff filed suit alleging that defendant was negligent in leaving the depression into which she stepped. The trial court granted summary disposition to defendant, on the ground that defendant had no duty to plaintiff and that the condition in question was open and obvious.

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). When reviewing an order of summary disposition under MCR 2.116(C)(10), we examine all documentary evidence in the light most favorable to the nonmoving party to determine whether there exists a genuine issue of material fact. *Id.* "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). We accept as true all factual allegations in the claim "to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id.*

If a condition is open and obvious, a duty to mitigate or warn of the condition arises only if some special aspect renders it unreasonably dangerous. See *Mann v Schusteric Enterprises, Inc*, 470 Mich 320, 332-333; 683 NW2d 573 (2004). The questions, then, are whether the

depression allegedly causing plaintiff to fall was an open and obvious condition, and, if so, whether some special aspect rendered it actionable even so.

"Whether a danger is open and obvious depends on whether it is reasonable to expect an average user of ordinary intelligence to discover the danger upon casual inspection." *Weakley v Dearborn Heights*, 240 Mich App 382, 385; 612 NW2d 428 (2000). Mildly uneven walking surfaces do not normally engender liability. "[D]iffering floor levels, such as . . . uneven pavement . . . are 'not ordinarily actionable *unless* unique circumstances surrounding the area in issue made the situation unreasonably dangerous.' " *Id.* at 386, quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995).

Some unevenness in gaps between, and levels of, pieces of pavement, or between a paved strip and the ground adjacent to it, are inherently characteristic of sidewalks in general. In the products liability context, the obviousness of a hazard is a function of "the typical user's perception and knowledge and whether the relevant condition or feature that creates the danger associated with use is fully apparent, widely known, commonly recognized, and anticipated by the ordinary user or consumer." *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 392; 491 NW2d 208 (1992). This reasoning applies to premises liability cases as well. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474; 499 NW2d 379 (1993). We know of no reason to frame the inquiry differently in the context of a pedestrian and a party who allegedly created a defect in a public walkway.

A pedestrian traversing a sidewalk with ordinary care would not only expect to encounter some unevenness in the pavement, but would expect also even less-pedestrian-friendly terrain adjacent to it. If an occasional gap or other irregularity in the pavement is normally open and obvious, likewise a hole in the ground adjacent to it would be. The trial court correctly held, as a matter of law, that the complained-of hazard was open and obvious.

Special aspects engendering liability for an open and obvious hazard exist where the person confronting the dangerous condition should be expected to hazard it despite the apparent danger, or where the severity of the potential harm the condition may cause is extreme. See *Lugo v Ameritech Corp*, 464 Mich 512, 518-519; 629 NW2d 384 (2001).

In this case, plaintiff maintains that she inadvertently stepped into the depression, not that the circumstances somehow compelled her to do so. Although a pedestrian may reasonably be expected to brave the ordinary flaws in a paved sidewalk, a pedestrian noting rough earth next to the walkway need only remain on the pavement to avoid it. Plaintiff points to no special condition that caused her step from the sidewalk into rough ground adjacent to it.

She does, however, point out that she was walking in the darkness of night, in the absence of artificial illumination. However, plaintiff cites no authority for the proposition that nighttime darkness itself can change an open and obvious hazard into an actionable condition. A pedestrian exercising ordinary care and prudence should simply take the darkness into account, trying all the harder to identify hazards lying ahead. In plaintiff's situation, the darkness should at least have caused her to take all the more care to remain on the paved portion of the walkway.

Our Supreme Court has held that where a sidewalk is safe in its ordinary condition it does not become an actionable hazard by accumulations of snow and ice. *Mayo v Village of Baraga*,

178 Mich 171, 175; 144 NW 517 (1913). If the onslaught of winter does not itself transform a safe sidewalk into an actionable hazard, neither should the onslaught of night. Either condition imposes a burden on the pedestrian to exercise additional care, not on parties responsible for sidewalks to structure them to repel or otherwise avoid the hazards attendant to such recurring natural conditions.

This leaves the question of the severity of the hazard posed by the alleged defect. *Lugo, supra* at 520. On the subject of potholes, our Supreme Court noted that, aside from their normally being visible, "it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury." *Id.* Likewise, the three- or four-inch depression at issue in this case likewise would pose no greater hazard.

For these reasons, we affirm the result below on the ground that the open and obvious doctrine renders plaintiff's claim inactionable. In light of our disposition of this case, we need not reach the question of duty.

Affirmed.

/s/ Alton T. Davis
/s/ David H. Sawyer
/s/ Bill Schuette